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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

**DOCKET FILE COPY ORIGINAL**

In the matter of )

**JAMES A. KAY, JR.** )

**WT Docket No. 94-147**

Licensee of one hundred fifty two Part 90 )  
licenses in the Los Angeles, California area )

To: The Commission

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**JUN 12 1998**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

**PETITION FOR EXTRAORDINARY RELIEF**

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Dated: June 12, 1998

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June 11, 1998

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In re: WT Docket No. 94-147  
James A. Kay, Jr.

Ladies and Gentlemen:

Submitted herewith, on behalf of James A. Kay, Jr., the licensee in the above referenced license revocation hearing proceeding, is his *Petition for Extraordinary Relief*. Among other things, Kay is asking that you act, on your own motion, to set aside the designation order and return this case to per-hearing status so that some extremely serious, and fully documented, irregularities, improprieties, and illegalities in connection with the Wireless Telecommunications Bureau's role in the investigation, designation, and prosecution of this matter. While these are serious matters that you should want to investigate for your own purposes, that you do so now is required in order to restore and protect Mr. Kay's statutory and Constitutional due process rights.

A separate booklet containing the extensive attachments that support and fully document these allegations will be filed on Monday, June 15, 1998. We also intend, at that time, to request that any further action in these proceedings by the Presiding Judge or the parties be stayed pending consideration of this pleading, and that you expedite consideration of this matter.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,



Robert J. Keller  
Counsel for James A. Kay, Jr.

cc: Magalie Roman Salas, Secretary (original plus 14 copies)  
John I. Riffer, Senior Ethics Counsel, Administrative Division, Office of General Counsel  
H. Walker Feaster III, Inspector General  
Daniel Phythyon, Chief, Wireless Telecommunications Bureau

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## SUMMARY

By this pleading Kay requests extraordinary relief designed to remedy extreme and severe due process violations in connection with this hearing. Kay details and fully documents numerous examples of irregularities, improprieties, and even illegalities in the investigation, designation, and prosecution of this case. It is shown that the Bureau prejudged Kay long before the case was ever designated; that the Bureau engaged in improper *ex parte* contacts in contested proceedings in which Kay was involved with the express purpose of assisting his opponents; that the Bureau unlawfully gives preferential treatment to those who complain, inform, and/or testify against Kay; that the Bureau, lacking evidence of wrongdoing by Kay, manipulated the designation of this case so that it could use discovery to engage in a massive fishing expedition to seek information to use against Kay; that the Bureau (and the Presiding Judge) deprived Kay of legally required notice as to the factual allegations against him until after discovery in this proceeding was closed; that in the course of its investigation, the Bureau accepted unquestioningly, relied upon, and used unsupported allegations against Kay from sources known to be biased against Kay, without making even minimal efforts to verify or corroborate the charges; and that the Bureau has coached witnesses against Kay, even to the point of soliciting false sworn statements against Kay.

Kay fully appreciates the seriousness of his charges regarding Bureau conduct, and he does not make such accusations lightly. But the gravity of these charges is precisely why they must be fully investigated. The detailed factual allegations set forth herein are supported by substantial proof in the form of sworn testimony, declarations, and virtually irrefutable documentary evidence. A separate book containing the various attachments documenting and corroborating Kay's assertions is being supplied to accompany this pleading.

The Commission must address and resolve these matters before the hearing of this case if Kay is receive anything resembling due process and a fair opportunity to defend himself. In addition to calling for a full investigation into these matters, Kay asks that the Commission, on its own motion, reconsider and set aside the *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("HDO"), 10 FCC Rcd 2062 (1994). Because the investigation leading to the designation of this proceeding was replete with such untoward conduct by the Bureau, Kay respectfully submits that the HDO itself and the proceedings being conducted under it are irreparably tainted. It flies in the face of common decency and fairness, not to mention procedural due process and equal protection of the law, to require Kay to defend himself in a proceeding so contaminated. The Commission should restore the status quo ante.

Alternatively, if the Commission does not reconsider and set aside the HDO, it should stay any further actions in this case pending a full and complete inquiry into his allegations regarding Bureau misconduct and mishandling of its investigation of Kay. It is simply impossible for Kay to receive a fair hearing until these matters are resolved. Finally, if the Commission neither sets aside the HDO nor stays the hearing proceeding, it must issue certain directives (described more fully elsewhere herein) to the Presiding Judge regarding the conduct of the hearing to mitigate, to the extent possible, the due process violations that have already occurred and to prevent further transgressions.

**BEFORE THE  
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In the matter of	)	
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<b>JAMES A. KAY, JR.</b>	)	<b>WT Docket No. 94-147</b>
	)	
Licensee of one hundred fifty two Part 90	)	
licenses in the Los Angeles, California area	)	

To: The Commission

**PETITION FOR EXTRAORDINARY RELIEF**

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.41 of the Commission's Rules and Regulations, 47 C.F.R. § 1.41, and the First Amendment of the Constitution of the United States,<sup>1</sup> hereby respectfully petitions the Commission for extraordinary relief in connection with the above-captioned hearing proceeding.

**I. INTRODUCTION**

**A. PRELIMINARY STATEMENT**

By this pleading Kay requests extraordinary relief designed to remedy extreme and severe due process violations in connection with this hearing. In Section II of this pleading, Kay details and fully documents numerous examples of irregularities, improprieties, and even illegalities in the investigation, designation, and prosecution of this case.<sup>2</sup> It is shown that the Bureau prejudged Kay long before the case was ever designated; that the Bureau engaged in improper *ex parte* contacts in contested proceedings in which Kay was involved with the express purpose of assisting his opponents; that the Bureau unlawfully gives preferential treatment to

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<sup>1</sup> The First Amendment guarantees, among other liberties, "the right of the people ... to petition the government for a redress of grievances." U.S. CONST. amend. I.

<sup>2</sup> A similar request was filed more than three months ago by Marc D. Sobel ("Sobel"), *see Revised Request for Inquiry and Investigation ("Sobel Request")*, submitted on March 2, 1998, in connection with WT Docket No. 97-56, but to date, to the best of Kay's knowledge, absolutely nothing has been done in response.

those who complain, inform, and/or testify against Kay; that the Bureau, lacking evidence of wrongdoing by Kay, manipulated the designation of this case so that it could use discovery to engage in a massive fishing expedition to seek information to use against Kay; that the Bureau (and the Presiding Judge) deprived Kay of legally required notice as to the factual allegations against him until after discovery in this proceeding was closed; that in the course of its investigation, the Bureau accepted unquestioningly, relied upon, and used unsupported allegations against Kay from sources known to be biased against Kay, without making even minimal efforts to verify or corroborate the charges; and that the Bureau has coached witnesses against Kay, even to the point of soliciting false sworn statements against Kay.

Kay fully appreciates the seriousness of his charges regarding Bureau conduct, and he does not make such accusations lightly. But the gravity of these charges is precisely why they must be fully investigated. The detailed factual allegations set forth herein are supported by substantial proof in the form of sworn testimony, declarations, and virtually irrefutable documentary evidence.<sup>3</sup>

If even a portion of these allegations are true, Kay has been prejudiced and substantially damaged by the Bureau's misconduct. Leaks of information to his competitors and improper *ex parte* communications with parties to proceedings in which he was involved harmed him financially and competitively. His ability to expand his business and improve the radio systems and services he provides to his customers has been inhibited by the Bureau's freezing the processing of all his applications. He has been required to expend substantial amounts of money and divert virtually all of his time to the defense of baseless charges by biased and jealous

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<sup>3</sup> Given this detailed documentation and verification, there is indeed a basis for and substance to (and, in many cases, irrefutable proof of) Kay's allegations. It is thus incumbent upon the Bureau to respond with more than mere general (but unsubstantiated) denials, objections based on procedural technicalities, and feigned indignation. See *Wireless Telecommunications Bureau's Opposition to Revised Request for Inquiry and Investigation ("Bureau's Sobel Opposition")* submitted in WT Docket No. 97-56.



competitors; yet, when Kay makes fully substantiated complaints against these same competitors they are ignored by the Bureau. He is continually denied any forum for addressing his complaints of Bureau misconduct--even the Presiding Judge responsible for this case that could result in the loss of Kay's very livelihood will not be bothered to even hear or consider the charges.

These matters, by their very nature, call into question the integrity of the Bureau's investigation of Kay and the legitimacy of the charges against him. It will be shown herein that there is a substantial likelihood that much of the evidence and many of the witnesses the Bureau intends to rely upon in its prosecution of Kay have been compromised and potentially contaminated by the Bureau's mishandling of the investigation. It is imperative that these matters be fully investigated and resolved before Kay can hope to have a fair hearing.

**B. SUMMARY OF RELIEF REQUESTED**

Section III of this pleading sets forth in detail the relief sought by Kay. In addition to calling for a full investigation into these matters, Kay asks that the Commission, on its own motion, reconsider and set aside the *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("HDO"), 10 FCC Rcd 2062 (1994). Because the investigation leading to the designation of this proceeding was replete with such untoward conduct by the Bureau, Kay respectfully submits that the HDO itself and the proceedings being conducted under it are irreparably tainted. It flies in the face of common decency and fairness, not to mention procedural due process and equal protection of the law, to require Kay to defend himself in a proceeding so contaminated. The Commission should restore the status quo ante.

Alternatively, if the Commission does not reconsider and set aside the HDO, it should stay any further actions in this case pending a full and complete inquiry into his allegations regarding Bureau misconduct and mishandling of its investigation of Kay. It is simply impossible for Kay to receive a fair hearing until these matters are resolved. Finally, if the Commission neither sets aside the HDO nor stays the hearing proceeding, it must issue certain directives

(described more fully elsewhere herein) to the Presiding Judge regarding the conduct of the hearing to mitigate, to the extent possible, the due process violations that have already occurred and to prevent further transgressions.

### **C. THE PROPRIETY OF THIS REQUEST**

Section 1.106 of the Commission's Rules allows a petition for reconsideration of a hearing designation order only "if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." 47 C.F.R. § 1.106(a)(1). Nevertheless, there are any number of provisions in the rules that authorize the Commission to take appropriate remedial actions either, *sua sponte* or upon motion, including the actions requested herein. Thus, Section 1.2 of the Commission's Rules provides: "The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty," 47 C.F.R. § 1.2. The Rules further provide, at Section 1.3: "Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3.

The Commission has, on prior occasions, effectively reconsidered and/or modified hearing designation orders notwithstanding the 1.106(a)(1) prohibition on reconsideration. Only recently, for example, the Commission entertained a petition for reconsideration of and in fact modified a hearing designation order. *Westel Samoa, Inc.*, 13 FCC Rcd 6342 (1998). Similarly, *Radio WAVS, Inc.*, 92 FCC 2d 1037 (1982), the Commission on its own motion (but after a request from the applicant) examined the record in a case where the presiding administrative law

judge had declined to grant summary decision, even though such a ruling is not appealable as a matter of right.<sup>4</sup> In the circumstances presented herein, the requested relief is entirely proper.

Clearly, the Commission will not—and should not—allow Section 1.106(a)(1) to prevent it from taking corrective action with respect to a hearing designation order when such action is required by the law or is in the public interest. Kay respectfully submits that such a case is presented here. Indeed, Kay presents herein information that, had it been known to the Commission at the time of the *HDO*, would surely have dictated against designation of this matter for hearing. Accordingly, this request is itself procedurally proper and the relief requested is appropriate.

## **II. IRREGULARITIES, IMPROPRIETIES, AND ILLEGALITIES**

The Bureau's conduct during the pre-designation investigation of Kay is replete with irregularities, improprieties, illegalities, and plain old discriminatory unfairness to Kay. It is apparent that at least some members of the Bureau staff harbored an improper animus toward, so clouding their judgment that their resulting misconduct has tainted the entire investigation and designation of this hearing. Unless and until this is fully investigated and resolved, Kay can not receive anything remotely approaching a fair hearing.

Kay will show herein the following:

- (a) The Bureau arranged for the designation of issues against Kay without any supporting evidence in the hope of using discovery as a fishing expedition.
- (b) The Bureau gives preferential and favored treatment to those who complain, inform, or testify against Kay. Substantial or even conclusive proof (indeed, very often actual under oath admissions) of their serious wrongdoing is ignored by the Bureau, while Kay, on the other hand, is subjected to star chamber proceedings.

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<sup>4</sup> Section 1.251(e) of the Rules provides that a ruling granting summary decision as to all issues or a dispositive issue is immediately appealable in the same manner as an initial decision, but that a denial of summary decision or an order granting a summary decision on only some issues is deemed interlocutory in nature. Subject to certain specifically delineated exceptions, interlocutory rulings are appealable only with leave of the Presiding Judge. 47 C.F.R. § 1.301.

- (c) The Bureau had already prejudged Kay and became determined to seek revocation of Kay's licenses before even advising him he was under investigation.
- (d) Certain members of the Bureau staff engaged in improper *ex parte* communications and disseminated inside information in contested proceedings so as to damage Kay, and otherwise improperly interfered with Kay's legitimate business activities.
- (e) In the course of its investigation, the Bureau accepted unquestioningly, relied upon, and used unsupported allegations against Kay from sources known to be biased against Kay, without making even minimal efforts to verify or corroborate the charges.
- (f) The Bureau has coached witnesses against Kay, even to the point of soliciting false sworn statements against Kay.

The Commission is reminded that these charges against the Bureau, grave though they may be, are fully supported and documented in the attachments.

**A. IMPROPER USE OF DESIGNATION AND DISCOVERY AS A WEAPON AGAINST KAY**

The following issues were specified in the *HDO*:

- a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act<sup>7</sup> and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to Commission inquiries;
- b) To determine whether James A. Kay, Jr. has willfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's Rules;
- c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules;
- d) To determine whether James A. Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;
- e) To determine whether James A. Kay, Jr. willfully or maliciously interfered with the radio communications of other systems, in violation of Sections 333 of the Act;
- f) To determine whether James A. Kay, Jr. has abused the Commission's processes in order to obtain cancellation of other licenses;

- g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether James A. Kay, Jr. is qualified to remain a Commission licensee;
- h) To determine if any of James A. Kay, Jr.'s licenses have automatically cancelled as a result of violations listed in subparagraph (c) pursuant to Sections 90.155, 90.157, 90.631 or 90.633 of the Commission's rules ....

*HDO* at ¶ 10 (footnotes omitted). The *HDO* sets forth the alleged factual predicate with respect to issue (a), and issues (g) and (h) of course are legal conclusions to be drawn based on the evidence presented on the preceding issues. But nowhere in the *HDO* is there a specific factual allegation, much less a single shred of factual evidence, indicating the basis for issues (b) through (f).

The *HDO* fails to meet applicable statutory and Constitutional due process requirements. Section 312(c) of the Communications Act provides that an "order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee ... to appear before the Commission ... and give evidence upon the matter." 47 U.S.C. § 312(c). As to issues (b) through (f), the *HDO* does not provide Kay with a sufficient statement of the matter to permit him to know what evidence he might give. Section 5(a) of the Administrative Procedure Act provides: "Persons entitled to notice of an agency hearing shall be timely informed of ... the matters of fact and law asserted." 5 U.S.C. § 554(b)(3). The *HDO* does not inform Kay of the matters of fact asserted with regard to issues (b) through (f). The lack of adequate notice also runs afoul of the due process clause of the Fifth Amendment of the Constitution. U.S. CONST. amend. V.

As framed, issues (b) through (f) merely reference various Commission regulations and policies and ask whether Kay has violated them. But statutory and Constitutional notice requirements are not satisfied by simply advising a licensee to defend his authorization against revocation, without specifically disclosing the factual allegations of misconduct involved.

*Wolfenbarger v. Hennessee*, 520 P.2d 809 (Okla. 1974) (case decided, in part, on due process

requirements under U.S. Constitution); *Shaw v. Valdez*, 819 F.2d 1055, 1074 (10th Cir. 1987). The Commission was obliged to advise Kay of the specific misconduct warranting revocation, and simply reciting the legal precepts involved does not satisfy this requirement. *See Soule Glas & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981); *Bloch v. Ambach*, 73 N.Y.2d 323, 332 (1989). The notice must give the subject a fair opportunity to present a defense. *Citizens Bank v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984). As to issues (b) through (f), the HDO failed miserably in this regard.

The violation of Kay's due process rights, moreover, was deliberate and intentional. This proceeding was admittedly designated without any evidence whatsoever to support issues (b) through (f). Attachment 1 is a copy of the September 15, 1994 memorandum from W. Riley Hollingsworth ("Hollingsworth"), then Deputy Chief, Licensing Division, of the Private Radio Bureau, to Ralph A. Haller, Chief of the Private Radio Bureau, proposing that license revocation proceedings be initiated against Kay.<sup>5</sup> Mr. Hollingsworth admits in his memorandum that the Bureau did not have information justifying the designation of issues (b) through (f). He instead proposed to have the Commission designate the case for hearing and then exploit the discovery process in an attempt to obtain information regarding those issues. Thus, Mr. Hollingsworth wrote:

*We have confidence that discovery will reveal that not all of Kay's stations are constructed, and that he exaggerates his loading to avoid the consequences of our channel sharing and channel recovery provisions. We include in the draft order miscellaneous allegations including possible misuse of Commission forms. These are based on various reports received from licensees.*

Attachment 1 at p. 2 (emphasis added). By the Bureau's own admission, therefore, discovery on issues (b) through (f) was, from its inception, intended as a fishing expedition. Hollingsworth

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<sup>5</sup> The draft order accompanying the memorandum is virtually identical to the HDO that was ultimately adopted by the Commission only three and one-half months later. The only difference between the Hollingsworth draft and the HDO eventually adopted by the Commission was the inclusion of an attachment listing the licenses at issue.

was determined to revoke Kay's licenses regardless of whether he had any evidence of wrongdoing by Kay.

Kay has been continually complaining of this lack of notice to the Presiding Judge, repeatedly asking that the Bureau be required to present a bill of particulars or, at least, that Kay be afforded additional discovery to remedy the problem. But the judge has just as consistently turned an indifferent ear to Kay. Most recently, for example, the Presiding Judge dismissed Kay's concerns with the following statement:

[I]t seems that Kay would know after three years of litigation and from his knowledge of the conduct of his business: whether he operated in the trunked mode; whether he constructed or deconstructed stations; whether there were avoidances of the sharing and recovery rule; and whether any of his stations interfered with other communications systems. If these ultimate facts exist and are known to Kay, then the issues to be contested through litigation should be whether the actions were willful and/or repetitive.

*Memorandum Opinion and Order*, FCC 98M-55, released May 15, 1998, at ¶ 8. In other words, the Presiding Judge simply erases the Communications Act and the APA, not to mention the Constitution, on the outrageous theory that the Commission need not give notice because the accused must surely know whether he committed the any wrongs at any time in the past.<sup>6</sup>

To fully appreciate Kay's predicament, consider the following. Assume a person were brought before a court to defend himself on charges of robbery. When he asks whom he allegedly robbed or when and where the robbery allegedly occurred, he is told he will have to wait until after the prosecution presents its case. When he objects that this is unfair, he is told it is not unfair because, after all, he should already know himself he had ever robbed anyone. No one would think for a moment that such a defendant had been afforded the due process our

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<sup>6</sup> The quoted statement also smacks of prejudgment of Kay. Assuming that Kay did not violate any of the regulations cited in issues (b) through (f)--an assumption the Presiding Judge must make until such time as the Bureau has met its burden of proof--he would therefore lack the knowledge of any specifics and therefore is being denied the information needed to defend himself. The *MO&O*, however, makes the opposite assumption, *i.e.*, Kay must already know the specifics since he was a party to the alleged wrongdoing.

Constitution demands. Yet, the Presiding Judge endorses such a Kafkaesque justification for the Bureau's refusal to provide Kay with advance notice of the specific factual charges against him.

On June 3, 1998, the Bureau voluntarily submitted the *Wireless Telecommunications Bureau's Statement of Readiness for Hearing* ("WTB Statement") in which, for the first time, it disclosed in summary form the factual predicates on which it would rely for issues (b) through (f). Coming as it did, more than two weeks after the close of discovery and less than three weeks before Kay is due to present its direct case, this is too little too late. The Bureau has, by its own admission, pursued designation and prosecution of issues for which it lacked sufficient factual basis, using discovery as a fishing expedition to search for something on which it might "hang" Kay on these various issues. The Bureau has throughout refused to provide Kay with a simple statement of what specifically he is alleged to have done to warrant these issues. To now give its proffer after Kay no longer has the right to discovery and on the eve of presentation of direct cases is contrary to both the spirit and the letter of the applicable statutory and Constitutional requirements.

The course taken by the Bureau is clearly improper. Issues should be designated only if there is a *prima facie* factual basis for them, and that basis should be disclosed at the outset. Discovery is then to be used to obtain further relevant information on the designated issues. But discovery is *not* properly used to attempt to justify issues after the fact, as the Bureau has done here. As the Commission has instructed: "The use of discovery to ascertain whether grounds exist for enlargement of the issues would be difficult to limit and offers *substantial opportunity for abuse*. [Our policy goal is] to avoid unduly prolonging the hearing process by "fishing expeditions" into an applicant's every possible minor blemish ...." *Discovery Procedures*, 11 FCC 2d 185, 187 (1968); *see also Fox Television Stations, Inc.*, 72 RR 2d 297 at ¶ 98 (Rev. Bd. 1993); *Priscilla L. Schwier*, 4 FCC Rcd 2659 (1989), *aff'd sub nom. New Life Evangelistic*



*Center, Inc. v. FCC*, 895 F.2d 809 (D.C. Cir. 1990); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978).

As the Review Board explained in *Metroplex Communications, Inc.*:

Ordinarily, of course, discovery is not permitted unless a specific hearing issue is added upon the showing of a "significant and material" question of fact. *See, e.g., Phoenix Media Corp.*, 97 FCC 2d 916, 921 (Rev. Bd. 1984). This is "black letter" law; and, so far as we are aware, no exceptions to this general tenet exist. Discovery is not permitted routinely as a mechanism to produce, if possible, an issue not yet recognized. *Discovery Procedures*, 11 FCC 2d 185, 187 (1968); *see Liberty Television*, 14 RR 2d 71, 74-75 & n.8 (Rev. Bd. 1968); *see also Folkways Broadcasting Co., Inc.*, 33 FCC 2d 813, 816 n.16 (Rev. Bd. 1972) (discovery is not to be used as a "fishing expedition").

4 FCC Rcd 8149 at ¶ 13 n.11 (Rev. Bd. 1989). A private party would not be permitted to abuse the Commission's hearing process by engaging in wide ranging discovery in the hopes of finding "dirt" on an opponent. Neither would the Commission designate nor a judge add issues based solely on the movant's self-serving expression of "confidence that discovery will reveal" the information necessary to justify the issues. Yet, that is precisely what the Bureau did in this case with respect to issues (b) through (f).

It is bad enough that the Bureau arranged for the addition of issues without any justification in the hope of finding evidence on them in discovery, but the Bureau's abuse of process and trampling of Kay's due process rights went much further. It is now evident that as to at least some of the issues, the Bureau had information clearly demonstrating that the issue was unfounded, *i.e.*, that the accusation was false. Consider, for example, issue (b), "whether ... Kay ... has willfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's Rules." The Bureau now, at the eleventh hour, states that it "does not intend to directly seek any sanctions for Kay's conduct in this regard." *WTB Statement* at ¶ 8. The Bureau explains:

In a letter dated June 21, 1993, Rosalind K. Allen, former Chief of the Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, explained that if the system included use of proper monitoring equipment, using convention channels in a group

without a dedicated trunk is permissible under Part 90. The Bureau does not believe there is sufficient evidence that Kay utilized conventional channels in an impermissible trunked configuration to proceed on this issue.

Id. at ¶ 11. But this does not fairly or accurately characterize the matter.

Commission field personnel conducted an inspection of Kay's Station WNWK982 at Mount Lukens on July 22, 1994, more than five months prior to the *HDO*. This investigation provided the Bureau with detailed information regarding the technical configuration of Kay's system. See, e.g., *Wireless Telecommunications Bureau's Response to Kay's First Set of Interrogatories* (March 8, 1985) at pp. 7-13, and *Deposition of Jim LaFontaine* (January 29, 1998). Thus, the Bureau knew or should have known, well in advance of designation, that Kay's system configuration was consistent with the aforementioned interpretation letter. The Bureau nonetheless included the trunking issue in the *HDO*, engaged in discovery against Kay on the issue, rejected Kay's repeated requests for a statement of particulars on the matter, only to drop the issue on the eve of hearing. A private party who engaged in such tactics to game the system and harass another party would surely be charged with abuse of process. The Bureau should be held to no less a standard.

A similar situation most likely exists with respect to issue (f). The Bureau now states:

This issue relates to allegations that Kay abused the Commission's processes to obtain the cancellation of other licenses. The Bureau has reviewed the available evidence and has decided not to proceed on this issue. The Bureau has taken discovery regarding the complaints it received and has decided that the allegations of misconduct by Kay to obtain cancellation of licenses of which the Bureau is aware involved allegations of civil fraud or contractual disputes more appropriately resolved in civil courts of competent jurisdiction.

*WTB Statement* at ¶ 20. This is a blatant mischaracterization. It has been demonstrated conclusively that in at least one case the ostensible allegations were actually (a) false (which the Bureau knew or should have known), and (b) suborned by Hollingsworth from a potential witness who had no knowledge, understanding, or even belief of the matters asserted. See Section II.F.1, below. Kay firmly believes that had he been given the particulars of the other

ostensible "allegations," he would have similarly demonstrated them to be false, if not fabricated perjury. It is disingenuous for the Bureau to simply sweep this under the rug as something beyond its domain, when in fact it is the area demonstrating vividly the depths to which certain members of the Bureau staff were willing to sink in an effort to bring Kay down regardless of the lack of evidence.

Clearly, Hollingsworth and his associates made a decision in 1994 to revoke Kay's licenses regardless of justification. They adopted the attitude of the erstwhile KGB: "Bring us the man, we will find the crime." Hollingsworth in effect told the Commission, "Designate the issues, I will discover the justification." In the process Kay was deprived of notice, restricted in discovery, and intentionally kept ignorant of what, if any, information the Bureau intended to present against him. But this is not the pre-glasnost USSR, it is the United States at the cusp of the 21st century. A Commission licensee, even one whom the staff does not particularly like or who is suspected of wrongdoing, is entitled to due process. Being subjected to a license revocation hearing on baseless issues, having discovery used against him in a search-and-destroy campaign, being intentionally deprived of information needed to defend himself has made a mockery of the process.

#### **B. PREFERENTIAL TREATMENT AND FAVORITISM TOWARD KAY'S ENEMIES**

The Bureau's treatment of Kay is born of a conscious animus toward him by certain members of the Bureau staff. This certainly existed during the pre-designation investigation stage of this matter, but it apparently continues to this day, despite protestations to the contrary. It is clearly evidenced by the preferential treatment and favoritism afforded those who have come forward to complain of, inform on, and testify against Kay. The Bureau's conduct in this regard is a textbook example of improper discriminatory treatment and a violation of the Constitutional guarantee of equal protection under the law.

During discovery and other pre-hearing procedures the Bureau disclosed the identity of many of the pre-designation complainants and informants against Kay as well as the potential hearing witnesses against Kay. Kay learned of others through Freedom of Information Act Requests, in connection with civil litigation, and by other means. Many of those individuals are competitors of Kay who themselves have licensing matters and other business before the Commission. The Bureau has repeatedly and consistently ignored and refused to act on documented and often conclusive showings of impropriety and illegality by such anti-Kay entities. In many such cases the Bureau simply turns a blind eye on conclusively demonstrated wrongdoing, some of which has even been admitted, under oath. This can not be squared with the Bureau's treatment of Kay. Indeed, it is a violation of Kay's right to equal protection which is part of his Fifth Amendment due process rights under the U.S. Constitution.

The Commission and its staff enjoy some degree of "prosecutorial discretion" in their enforcement actions. But it is a blatant abuse of discretion for the Bureau to discriminate in its enforcement activities on the basis of who is for and who is against Kay. The Bureau has imposed one set of onerous rules on Kay, and a different favorable set of rules to Kay's enemies. In the following pages we detail but a few examples of such unlawful and unconstitutional discrimination.

#### **1. Harold Pick**

One of the primary complainants and informants against Kay is one Harold R. Pick ("Pick"). He was identified by the Bureau in discovery as one having personal knowledge of alleged malicious interference by Kay, and documents obtained from the Bureau either through discovery or FOIA requests include numerous complaints against Kay by Pick. Although Pick was not identified as a potential witness in the Kay hearing, the Bureau obtained a sworn statement from him in preparation for hearing. It is well known to Bureau staff that Pick is one of Kay's biggest enemies, and that Pick and Kay are competitors and adverse parties in numerous

contested matters pending before the Bureau. The Bureau has repeatedly afforded favorable treatment to Pick, unlawfully taking actions favorable to him, and refusing to take appropriate enforcement actions against him. The Bureau ignores repeated *ex parte* violations by Pick, and even takes actions favorable to him in response to *ex parte* requests involving contested matters. The matters discussed below are but two examples of this discriminatory treatment.<sup>7</sup>

(a) Unlawful and Untimely License Reinstatement

In connection with proceedings arising out of a petition for bankruptcy filed by Pick, on May 12, 1995, the United States Bankruptcy Court for the Central District of California issued an Order Authorizing Chapter 7 Trustee to Sell Assets of the Estate in Case No. LA93-38738LF ("*Bankruptcy Order*"). The Bankruptcy Order authorized the trustee to sell the assets, including WNZB276 and WNZB262, to Kay or his assignee. For consideration received, the trustee executed and caused to be filed with the Commission FCC Forms 405A requesting cancellation of the authorizations. According to FCC records, of which official notice may be taken, the captioned authorizations were in fact canceled and the call signs purged from the FCC's license database. This occurred no later than September 21, 1995 for WNZB276 and no later than October 17, 1995 in the case of WNZB262. In February of 1995, however, more than four months after the action canceling the licenses and purging them from the database, the Bureau inexplicably reinstated the authorizations. There was no public notice of this action, no actual notice to the trustee, and attempts to obtain an explanation from Bureau staff proved unfruitful. Accordingly, petitions for reconsideration were presented to the Bureau.

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<sup>7</sup> When confronted with these allegations in the *Sobel Request*, the Bureau has offered the insipid retort that Pick is not on the Bureau's witness list and that his credibility is not at issue. *Bureau's Sobel Opposition* at ¶ 20. This is far wide of the mark. While Pick certainly would not make a credible witness, that is hardly the point. He has assisted the Bureau as a complainant and informant against Kay. It is reasonable to question, therefore, whether the Bureau's improper reinstatement of his authorizations was not motivated by his "assistance" in the Bureau's campaign against Kay.

Pursuant to the *Bankruptcy Order*, the trustee had the legal and judicially conferred right to cause the captioned license to be canceled or assigned to its designee. Prior to submitting the FCC Form 405A, bankruptcy counsel for the trustee contacted Bureau staff to inquire about appropriate procedure and provided Bureau staff with a copy of the Order. Bureau staff provided the trustee with the requisite FCC Forms 405A and with a certified list of the licenses held by Harold Pick. The trustee followed the procedures suggested by Bureau staff. Thus, the cancellations were within the rights of the trustee, in full accordance with Commission procedure, and were pursued in good faith.

The Bureau's inexplicable reinstatement of the authorizations was clearly unlawful. Section 1.113(a) of the Commission's Rules provides that an action taken under delegated authority may be set aside *sue sponte* by such designated authority only within thirty days of the action. 47 C.F.R. § 1.113(a). The reinstatements in this case came more than four months after the actions canceling the licenses. Moreover, there was no notice to the trustee. There is no evidence in the public record that any party timely submitted a petition for reconsideration or an application for review within 30 days of the cancellations, and if any such petition was filed, it was not served on trustee as required by Commission Rule. The only possible explanation, therefore, is that there were informal communications between Pick and Bureau staff leading to the reinstatement. If this is the case, then both Pick and Bureau staff engaged in a blatant violation of the Commission's *ex parte* rules as well as an unlawful interference with Kay's and the trustee's rights under the *Bankruptcy Order*.

When confronted with these allegations in the *Sobel Request*, the Bureau branded the charge of improper *ex parte* communication in this matter as "nothing more than sheer speculation." *Bureau's Sobel Opposition* at ¶ 20. This is not true. While Kay can not provide direct proof of an *ex parte* communication, the circumstantial evidence is compelling and the logical conclusion is virtually inescapable. Upon informal inquiry as to the reason for the

reinstatement of the licenses in question, Bureau processing staff advised that it was due to a pending appeal by Pick of the bankruptcy court's order. In response to a Freedom of Information Act ("FOIA") request seeking any and all correspondence and documents relating to the reinstatement, the Bureau produced copies of official documents relating to the appeal. Interestingly, these documents included only the filings made with the court by Pick, not any of the responsive filings made by Kay. This information was not provided to the Bureau by Kay or by the bankruptcy trustee (both of whom formally challenged the reinstatements). The logical conclusion, therefore, is that the documents were provided to the Bureau by Pick as part of a plea to have his authorizations reinstated.<sup>8</sup>

It was informally learned that the apparent theory for the Bureau's unexplained and unlawful actions was a then-pending appeal of the Bankruptcy Order by Pick. This did not justify the actions however. The Bankruptcy Order was then, is now, and at all relevant times has remained, in full force and effect and has been neither stayed nor set aside by any judicial authority. Section 405(a) of the Communications Act, 47 U.S.C. § 405(a), and Section 1.106(n) of the Commission's Rules, 47 C.F.R. § 1.106(f), provide that a Commission or staff action remains in full force and effect pending any reconsideration or review absent a specific order of stay. If a petition for reconsideration within the Commission does not automatically stay a staff action, it would be ironic indeed if an appeal in a judicial matter entirely unrelated to the Commission were deemed to do so. In any event, Pick's appeal of the Bankruptcy Order is no

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<sup>8</sup> The only alternative explanation is that the Bureau obtained the documents directly from the bankruptcy court. If so, why did it seek only Pick's pleadings and not Kay's responsive pleadings? How would the Bureau have even known about the appeal if Pick had not advised them? And why would the Bureau have sua sponte sought out those documents and then relied on them to reinstate Pick's authorizations long after the statutory deadline? Even if the Commission accepts the incredible position that there were no *ex parte* communications with Pick, it is clear the Bureau was going out of its way--and beyond its statutory authority--to assist Pick in this matter.

longer pending. On 14 April 1997 the United States Court of Appeals for the Ninth Circuit issued an Order in Case No. 96-56777 dismissing Pick's appeal for failure to prosecute.

Kay, along with the trustee and a third-party beneficiary sought reconsideration of the Bureau's unlawful action in March of 1995. The petitioners were served with no response from Pick, yet the Bureau still had not acted on them over two years later when, on May 30, 1997, Kay filed an application for review seeking Commission relief from the Bureau's inaction. Attachment 2. To date there has been no action on the application for review.<sup>9</sup> As the Commission is aware, the Bureau is responsible for recommending disposition of applications for review of non-hearing delegated authority actions, so responsibility for continued lack of action on this matter still rests with the Bureau.

(b) Misrepresentation and Falsification of Documents

The Bureau's favorable treatment of Harold Pick goes far beyond the discriminatory disregard of statutorily imposed processing requirements and time limits. The Bureau has ignored and refused to act on conclusive evidence that Pick gave a false affidavit to the Commission and even went so far as to falsify documents submitted to the Commission in support of his false declaration.

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<sup>9</sup> Although the Bureau has never formally acted on the petitions for reconsideration, nor has the Commission ever acted on the applications for review, the subject licenses have since been deleted from the Commission's database and accuses Sobel of withholding this information. *See Bureau's Sobel Opposition* at ¶ 20. The untimely deletion of the licenses, however, does not answer Sobel's charge. The deletions occurred on October 27, 1997. That hardly changes the fact that the Bureau illegally reinstated the authorizations and then allowed the reinstatements to stand for two full years over the strenuous and formal objections of three separate parties. The Bureau was being less than candid when it claims that "Kay and the trustee have received the relief they sought," *id.*, for the Bureau has never made any effort to advise Kay or the trustee of its action, much less issue a formally ruling on the pending petitions for reconsideration and application for review. Moreover, on information and belief, the licenses were canceled for reasons having nothing whatsoever to do with Kay's petitions, and for reasons which, in accordance with the spirit, if not the letter, of the *ex parte* rules, the Bureau should have communicated to Kay.



In the course of a finder's preference proceeding, FCC File No. 93F600, Sobel presented to the Bureau conclusive evidence that Harold Pick and his now deceased father, Gerard Pick, lied to the Commission regarding the date on which a station had been placed into operation and also falsified documents and presented them to the Commission in an attempt to support the lie. Specifically, in support of their assertion that a challenged station had been timely constructed, the Picks falsified and then submitted invoices purporting to show that crystals for the stations had been purchased before the construction deadline.

In a sworn statement submitted to the Commission on June 23, 1993, Harold Pick stated, under penalty of perjury: "The repeater was installed on Oat Mountain 15 January 1993 at 2:00 PM, frequency 854.08750 MHz." Attachment 3. Sobel filed his *Supplement to Opposition to Petition for Reconsideration* on October 20, 1994, Attachment 4, in which he presented conclusive evidence that Harold Pick's sworn statement was false and that Gerard Pick had also submitted falsified documents in support of Harold's lie. Specifically, Gerard Pick filed what purported to be an invoice showing that the crystals for 809/854.08750 MHz, the frequency recited in Harold Pick's false declaration, had been purchased on January 1, 1993. Sobel demonstrated, however, that this was a counterfeit. The Picks had cut off the bottom half of an invoice for the crystals and pasted it to the top half of a different invoice bearing the January 1, 1993, date. The genuine invoice showed that the crystals were not even ordered until February 4, 1993, and that they were picked up and signed for by Harold Pick on February 9, 1994. The Picks never responded to this conclusive showing of misrepresentation, lack of candor, and falsification of documents with intent to deceive, and the Bureau seems not to care. The Bureau is willing to give Pick a pass on having committed perjury and forged documents, simply because Pick is willing to point an accusing finger at Kay.